ALERT MEMORANDUM

Commission v. Ireland and Others (C-465/20 P): Landmark CJEU Ruling Upholds the Commission Decision Ordering Ireland to Recover €14 Billion in Back-Taxes from Apple

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On September 10, 2024, the Court of Justice delivered its much-awaited ruling in *Commission v Ireland and Others*, the so-called *Apple* tax rulings case.[1] The Court overturned the General Court judgment[2] and upheld the Commission's decision, which had found that the profit allocation methods within the Apple group endorsed by two Irish tax rulings constituted incompatible State aid to Apple and ordered the recovery of €14.3 billion.[3]

1. The Commission Orders Ireland to Recover the Unlawful Aid from Apple

The Apple case followed a range of State aid investigations initiated by the Commission since 2013 in relation to tax rulings.[4]

1 *Commission v Ireland and Others* (Case C-465/20 P) EU:C:2024:724 ("Apple Judgment").

2 *Ireland and Apple v. Commission* (Cases T-778/16 and T-892/16) EU:T:2020:338 ("GC Judgment").

3 *Aid to Apple* (Case COMP/SA.38373) – Commission decision of August 30, 2016 ("EC Decision").

4 An overview of the Commission's enforcement activities in relation to tax rulings can be found here.

In 2016, the Commission had found that Ireland granted a selective advantage to Apple through two individual tax decisions ("tax rulings")[5] adopted in 1991 and 2007, addressed to the Irish-based subsidiaries, Apple Sales International ("ASI") and Apple Operations Europe ("AOE") (together, "the Irish branches"). These tax rulings allowed the Irish branches to enjoy a lower taxable profit than under normal market conditions.

Accordingly, the Commission determined that the two Irish tax rulings addressed to the Irish branches constituted unlawful and incompatible State aid under Article 107(1) TFEU and ordered Ireland to recover from Apple €13 billion with interest (€14.3 billion in total). In particular, the Commission found:

— first, that through the tax rulings the Irish tax authorities granted Apple a selective advantage that constituted State aid by accepting its unsubstantiated claim that its IP licenses should be allocated for tax purposes outside of Ireland to the head offices of the Irish branches (which were not taxed anywhere), which led to the Irish branches' annual chargeable profits departing from a market-based outcome in accordance with the so-called "arm's length principle"[6] (the "primary line of reasoning");[7]

— subsidiarily, the Commission found that even if the Irish tax authorities had been correct in accepting Apple's claim, their tax rulings would still have resulted in State aid because they approved a profit allocation based on inappropriate methodological choices, which led to a reduction in Apple's corporate tax compared to undertakings in a similar situation (the "subsidiary line of reasoning");[8] and

— in the alternative, the Commission concluded that since the Irish tax provisions[9] did not lay down any objective criteria for allocating profits to different parts of a non-resident company, the broad discretion applied in the tax rulings necessarily conferred a selective advantage on Apple (the "alternative line of reasoning").[10]

We covered the EC Decision in more detail in our past Alert memorandum here.

2. The General Court Annuls the EC Decision

On July 15, 2020, the General Court annulled the 2016 EC Decision on the ground that the Commission did not prove to the requisite legal standard that the Irish tax rulings had granted Apple a selective advantage. In particular, the General Court found that the Commission failed to prove that:

— Apple's IP licenses and associated profits should have been attributed to Apple's Irish branches, as opposed to the head offices (primary line of reasoning). Notably, the General Court had found that the Commission had erred in applying an "exclusion approach", *i.e.*, presuming that since the head offices of ASI and AOE had no presence or employees, they could not have controlled the relevant IP licenses, and therefore all associated profits must be allocated by default to the Irish branches;

— insufficient profits were allocated to Apple's Irish branches (subsidiary line of reasoning); and

5 The function of a "tax ruling" is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances. For reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally. *See* Commission's Notice on the Notion of Aid, Section 5.4.4, available here.

6 The arm's length principle is used by the Commission to establish whether the taxable profit of a group company for corporate income tax purposes has been determined based on a methodology that produces a reliable approximation of a market-based outcome. A tax ruling endorsing such a methodology ensures that that company is not treated favourably under the ordinary rules of corporate taxation of profits in the Member State concerned as compared to standalone companies who are taxed on their accounting profit, which reflects prices determined on the market negotiated at arm's length. *See* Commission's Notice on the Notion of Aid, *op. cit.*, para. 172 *et seq*.

7 EC Decision, paras. 265–321.

8 EC Decision, paras. 325–360.

9 Section 25 of Taxes Consolidation Act 1997 (TCA 97).

10 EC Decision, paras. 369–403.

— the Irish tax rulings involved the exercise of discretion (alternative line of reasoning).

We covered the GC Judgment in more detail in our past Alert memorandum here.

3. Advocate General Pitruzzella Sides with the Commission

On September 25, 2020, the Commission appealed the GC Judgment.

On November 9, 2023, Advocate General Giovanni Pitruzzella ("AG Pitruzzella") delivered his Opinion, advising the Court of Justice to uphold the Commission's appeal and set aside the GC Judgment.[11] In particular, AG Pitruzzella opined that:

— regarding the primary line of reasoning, the General Court made a number of fundamental legal and methodological errors, particularly around the attribution of IP licenses and related profits for corporate tax purposes; and

— regarding the subsidiary line of reasoning, the Commission had sufficiently demonstrated that the tax rulings actually granted an advantage to Apple, insofar as the Irish authorities accepted a method of calculation that contained "fundamental errors" that necessarily undervalued Apple's profits;

— but AG Pitruzzella did not assess the alternative line of reasoning.

We covered the Opinion in more detail in our past Antitrust Watch entry here.

4. The Court of Justice Overturns the GC Judgment

In its judgment, the Court of Justice upheld the Commission's arguments under the primary line of reasoning, which was sufficient to uphold the EC Decision. As a result, the Court did not review the subsidiary and alternative lines of reasoning. In essence, the Court of Justice found that the General Court had committed a number of errors in its assessment of the Commission's primary line of reasoning:

— first, the General Court erred in law by finding that the Commission had adopted an "exclusion approach" in its examination of the activities performed, the assets used and the risks assumed by the Irish branches for the purposes of applying the relevant Irish corporate tax rules and, hence, determining the chargeable profits in Ireland for those non-resident Irish branches;[12]

— second, the General Court committed a breach of procedure by taking inadmissible evidence into account when it concluded that the Apple Group's IP was necessarily managed by the Irish subsidiaries;[13]

— third, the General Court erred by focusing on the functions and risks assumed by the parent Apple Inc. in relation to IP, instead of concentrating solely on the activities performed by the Irish branches and their head offices in relation to the management and exploitation of the IP licenses, departing from the tax principles applicable under Irish law;[14] and

— fourth, the General Court imposed an excessive burden of proof on the Commission when it found that the fact that the minutes examined by the Commission did not give details of decisions concerning the management of the Apple Group's IP licenses, of the cost-sharing agreement and of important business decisions does not mean that those decisions were not taken.[15]

In sum, the Court of Justice found that the General Court's review of the Commission's assessment of the selective advantage granted by Ireland to Apple was flawed on multiple counts and set aside the GC Judgment.

5. The Court of Justice Upholds the EC Decision

The Court of Justice then gave final ruling on the matter, rejecting all of the arguments raised by Ireland and

[11] *Commission v. Ireland and Others* (Case C-465/20 P), Opinion of Advocate General Pitruzzella, EU:C:2023:840 ("Opinion").

[12] Apple Judgment, paragraphs 117-131 and 254.

[13] GC Judgment, paragraph 301; Apple Judgment, paragraphs 193 and 255.

[14] Apple Judgment, paragraphs 222 and 256.

[15] Apple Judgment, paragraphs 245 and 257.

Apple (the "applicants") in the first instance.[16] Regarding the examination of the condition of selective advantage, the Court of Justice mainly found that:

— First, the applicants had not contested in a cross-appeal multiple points of their initial appeal that had been rejected by the General Court. These points therefore had acquired the force of *res judicata* and notably included the Commission's (i) alleged conflation between the condition of economic advantage and the condition selectivity;[17] (ii) identification of the reference framework; and (iii) application of the arm's length principle based on the OECD approach.[18]

— Second, the Commission had shown that the Irish branches had in fact performed activities in connection with the Apple Group's IP licenses, as well as the absence of consistent evidence establishing that strategic decisions were taken and implemented by their head offices outside of Ireland; hence, the Irish tax authorities' allocation of the taxable profits to those branches was justified.[19]

— Third, the Commission was entitled to rely on the presumption that individual aid is selective and that, in any event, the Commission had followed the three-step analysis established by the EU Court's case law to determine the selectivity of a national tax measure, without the applicants demonstrating that this analysis was flawed.[20]

In addition, the Court of Justice rejected the applicant's claims that the Commission had (i) erroneously concluded that there had been an intervention by the State or through State resources;[21] (ii) conducted its investigation in breach of essential procedural requirements, *i.e.*, the right to be heard;[22] (iii) ordered the recovery of the State aid in breach of the principles of legal certainty and the protection of legitimate expectations;[23] (iv) had encroached on the competences of the Member States, *i.e.*, their fiscal autonomy;[24] and (v) inadequately reasoned the EC Decision.[25]

6. Final Remarks and Possible Implications

After a series of prominent losses in the area of State aid and tax rulings, including *Starbucks, Fiat, Amazon and Engie*,[26] the landmark Apple judgment partly vindicated the Commission's record.

16 Apple Judgment, paragraphs 260-267 *et seq.*

17 Apple Judgment, paragraphs 272-275 and paragraphs 295-297. In the recent *Facheverband Spielhallen eV and LM v Commission* case, C-831/21, ECLI:EU:C:2023:686, the Court, relying on the *Fiat* ruling, found that the assessments whether a tax measure (i) is selective and (ii) confers an economic advantage overlap, insofar as they both imply comparing the outcome endorsed by the tax measure with the reference system, and therefore the two conditions may be examined together.

18 Apple Judgment, paragraphs 276, 278 and 279. The OECD Approach requires a functional analysis aimed at identifying the assets, functions and risks that should be allocated to the company's permanent establishment ("PE"). Under this approach, the profits attributable to a PE are those that the PE would have earned had it been a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions.

19 Apple Judgment, paragraphs 277 and 282-288.

20 Apple Judgment, paragraphs 294-311. In *Commission v MOL*, C-15/14 P, EU:C:2015:362, the Court of Justice established that aid addressed to individual beneficiaries is presumed to be selective and, therefore, the assessment simply turns to whether the measure grants an advantage. In addition, the EU Courts have established a three-step analysis to assess the selectivity of measures that appear to be general in nature, such as aid schemes, consisting of the assessment of: (i) the reference system; (ii) whether the measure derogates from the said reference system by differentiating between economic operators that are in a comparable legal and factual situation; and (iii) whether such deviation is justified in light of the guiding principles of the tax system.

21 Apple Judgment, paragraphs 314-321.

22 Apple Judgment, paragraphs 330-344.

23 Apple Judgment, paragraphs 351-366.

24 Apple Judgment, paragraphs 370-384. In essence, the Court of Justice repeated the established case law that in areas where the Member States enjoy exclusive competence, such as in the field of direct taxation, the Member States have to exercise that competence in compliance with EU law.

25 Apple Judgment, paragraphs 389-397.

26 *Netherlands v Commission* (Case T-760/15), EU:T:2019:669; *Luxembourg v Commission* (Case C-

However, the judgment implies that Ireland and Apple may have missed the chance to have a different outcome (see Section 5 above, first bullet point), and annul the EC Decision, as the Court of Justice had recently:

— in *Fiat,* overturned the judgment of the General Court, holding that the Commission could not apply a "European" arm's length principle based on the OECD approach that departs from or is not incorporated in national law;[27]

— in *Amazon*, heavily relied on *Fiat* and repeated the same point, finding that the General Court had committed the same error of law, but nevertheless maintained the General Court's judgment, as it had annulled the Commission decision on other grounds that were well-founded;[28] and

— similarly, in *Engie*, overturned the judgment of the General Court, holding that it is not up to the Commission to pick the reference framework by trying to define the objective of the national tax system; instead, the Commission should accept the Member State's interpretation of its own national law, unless is not aligned with the prevailing interpretation under the national legal system based on the relevant legal provisions, case law, and decisional practice.[29]

The main theme underlying the EU Court's case law in the area of State aid and tax rulings is that the Member States are exclusively competent on direct taxation. But Member States have to exercise that exclusive competence in conformity with EU law. Therefore, as a matter of principle, the Commission has jurisdiction to review whether national tax measures (such as tax rulings) confer a selective advantage to certain competitors in the sense of Article 107(1) TFEU. However, the very construction of the test set out by established case law in taxation cases (which implies verifying a deviation from national law or from its guiding principles) implies that the Commission must carry out that assessment within the boundaries of the national legal systems. In other terms, the Commission cannot rely on an "EU-wide" perspective based on general principles of law or other international guidance, such as that from the OECD on the application of the arm's length principle). Only where the Member States manifestly depart from the prevailing interpretation of the national rules and established practice, will the Commission be able to again assert its enforcement powers and find a selective advantage, thus taking a different position from that of the investigated Member State (see *Engie* above).

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885/19), EU:C:2022:859; *Commission v Amazon and Others* (Case C-457/21) EU:C:2023:985; and *Luxembourg v Commission* (Case C-451/21), EU:C:2023:948.

[27] *Fiat* (Cases C-885/19 P and C-898/19 P) EU:C:2022:859, paragraphs 91-96 *et seq*. *See* our previous coverage of the *Fiat* judgment here.

[28] *Commission v Grand Duchy of Luxembourg and Amazon* (C-457/21 P) EU:C:2023:985, paragraphs 39-52.

[29] *Grand Duchy of Luxembourg and Engie v Commission* (Cases C-451/21 P and C-454/21 P) EU:C:2023:948, paragraphs 117-120. *See* our previous coverage of the *Engie* judgment here.